No. 97-484

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Supreme Court of the United States

OCTOBER TERM, 1997

REGINALD CLEMONS,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITIONER'S REPLY BRIEF

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POINT I.

RESPONDENT'S ARGUMENT THAT "NO, SIR" DOES NOT MEAN "NO, SIR" IS MERITLESS, INCONSISTENT WITH THIS COURT'S PRIOR RULINGS, AND DEPRIVES FIFTH AMENDMENT PROTECTIONS OF ALL MEANING

Respondent acknowledges that "if an individual unequivocally indicates that he wishes to remain silent, 'interrogation' must cease." Resp't Br. at 4. Yet petitioner's "no, sir" in response to the question of whether he wished to make a statement could not have been more unequivocal. The police were therefore obligated to honor petitioner's request by immediately ceasing the interrogation for a "significant" period of time. *See Michigan v. Mosley*, 423 U.S. 96, 106 (1975).

Respondent's effort to justify the continued questioning of petitioner is directly at odds with the rulings of this Court. First, respondent argues that "indecisive" defendants are not entitled to constitutional protections. Resp't Br. at 4. But such a contention cannot be reconciled with this Court's rulings in *Miranda v. Arizona*, 384 U.S. 436, 473 (1966), that a defendant can invoke his rights "in any manner, at any time prior to or during questioning," and in *Mosley* that a defendant's right to terminate questioning must be scrupulously honored. 423 U.S. at 106.[1]

Respondent's argument ultimately proves too much. If a defendant does not immediately assert the right to remain silent, by

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1. Respondent cites inapposite Missouri precedents for the proposition that the police may continue an inquiry where the defendant's response was unclear on its face. Here, however, because petitioner's words could not have presented a clearer articulation of his desire to remain silent, "clarification" was neither necessary nor permissible. Moreover, respondent's reliance on petitioner's subsequent statements to validate its violation of his rights is an "untenable" post hoc rationalization. *Smith v. Illinois*, 469 U.S. 91, 97 (1984).

respondent's logic, the police can always construe a subsequent invocation as ambiguous, concluding after the fact that "he simply misspoke." Resp't Br. at 5. The purpose of this Court's prophylactic rule, however, was not to widen police discretion, but to rein it in to prevent precisely the type of abuse that occurred here. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

POINT II.

RESPONDENT IGNORES THE CLEAR RECORD IN THIS CASE WHICH ESTABLISHES BEYOND DISPUTE THAT VENIREPERSON DOSS COULD HAVE APPLIED THE DEATH PENALTY

Respondent contends that the trial court's *sua sponte* striking of death-scrupled venireperson Virto Doss was "within its discretion." Resp't Br. at 9. But respondent avoids quoting the record in this case which demonstrates beyond peradventure that Doss could have applied the death penalty in appropriate circumstances despite his initial reluctance.[2] The trial court made no findings as to Doss's credibility, but rather relied on "recollection" and "notes" in striking Doss for cause when no motion to strike was pending. App. at 147a. The trial court's

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2. Respondent's recitation of the facts is completely flawed. For instance, respondent wrongly asserts that petitioner did not preserve the argument for appeal, Resp't Br. at 8, when the record makes clear that a timely objection was made. *See* App. at 147a ("Judge . . . I asked him if he could follow the instructions, and he understood the difference between the two. He certainly did."), 148a ("[W]e make objection to all of these strikes of course, all of these strikes."). Similarly, respondent errs in stating that Doss "did not say" whether he could sentence an accomplice to death. In fact, Doss *explicitly* and *repeatedly* stated that he could vote for the death penalty even if the evidence showed that petitioner himself did not kill the victims. App. at 133a.

unwarranted action violated petitioner's rights under the Sixth Amendment.

On this record, no reasonable person could conceivably be left with the "definite impression" that Doss "would be unable to faithfully and impartially" apply the law. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985). After his initial qualms about the death penalty, Doss—*on six separate occasions*—stated without equivocation or elaboration that he could apply the death penalty. *See* App. at 131a ("Not after you present me with the facts, I can"), 132a ("No."), 133a ("Yes."), 133a ("Yes."), 139a ("Yes."), 140a ("Yes."). Continued questioning by both sides left no doubt that, despite his scruples, Doss was willing to vote for the death penalty under appropriate circumstances. Even the State did not move to strike Doss for cause, lending further credence to the notion that Doss was a qualified, suitable juror. The trial judge's subsequent "recollection" regarding Doss's statements was simply erroneous. App. at 147a.

The most cursory examination of the transcript of Doss's voir dire, *see* App. at 130a-140a, reveals that he is precisely the type of juror to whom the logic of *Gray v. Mississippi*, 481 U.S. 648 (1987) and *Wainwright v. Witt*, 469 U.S. 412 (1985), applies. If the groundless striking of venireperson Doss did not violate petitioner's rights under the Sixth Amendment, it is difficult, if not impossible, to imagine a potential juror to whom this Court's ruling in *Gray* and *Wainwright* might apply. Respondent's meritless argument would render this Court's Sixth Amendment jurisprudence utterly meaningless.

POINT III.

THE DOUBLE-COUNTING OF AN AGGRAVATING FACTOR WAS CONSTITUTIONAL ERROR UNDER MISSOURI'S "WEIGHING" SENTENCING SCHEME

Missouri is a "weighing" jurisdiction, because the "weighing" process is integral to its death penalty statute. *See* Pet'r Br. at 27-28. The Missouri statute explicitly requires juries to determine whether the mitigating evidence is "sufficient to outweigh the evidence in aggravation." Mo. Rev. Stat. § 565.030(4)(3). Thus, several courts—including the Missouri Supreme Court—have held that Missouri is properly considered a "weighing" jurisdiction. *See, e.g., Schneider v. Delo*, 890 F. Supp. 791, 827 n.11 (E.D. Mo. 1995); *State v. Whitfield*, 837 S.W.2d 503, 511-12 (Mo. banc 1992); *see also* Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441, 462 (1994).

Because Missouri is a weighing jurisdiction, the presence of an invalid aggravating circumstance—in this case one that was double-counted—means that petitioner's death sentence cannot stand unless the error is independently found to be "harmless." *See Clemons v. Mississippi*, 494 U.S. 738, 750-52 (1990).[3]

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3. Whether a jurisdiction is deemed to employ a "weighing" or a "non-weighing" scheme is, as this Court has recognized, a determination of "critical importance." *Stringer v. Black*, 503 U.S. 222, 231 (1992). Erroneous aggravating factors must be reviewed for harmless error in "weighing" jurisdictions because it is impossible to determine whether an improper aggravating factor "skew[s]" the jury's calculations. *Id.; see also Clemons*, 494 U.S. at 750-52. Under non-weighing schemes, no such harmless error review is required. *See Zant v. Stephens*, 462 U.S. 862, 870 (1983).

A. At Most, Respondent's Brief Raises a Constitutional Issue That This Court Has Yet To Address: What Standard of Review Applies to "Hybrid" Jurisdictions?

Respondent cites without analysis separate authority in support of its contention that Missouri's capital sentencing scheme should be considered "non-weighing," *see* Resp't Br. at 11-12, but does not, and cannot, contest that Missouri's statute directs juries to weigh mitigating evidence against aggravating evidence.

Instead, respondent raises only the obvious fact that, after weighing mitigating factors, a jury in Missouri retains discretion not to impose the death penalty. *See* Mo. Rev. Stat. § 565.030(4)(4). Although the mere presence of such a "non-weighing" element does not alter the fact that weighing is required, respondent's argument in its best light suggests that Missouri could be characterized as a "hybrid" jurisdiction. If respondent's argument has any merit at all, it presents a new question which may be stated as follows:

> Whether a capital sentencing scheme which combines elements of both "weighing" and "non-weighing" statutes (*i.e.*, a "hybrid" scheme) is governed by the harmless error analysis set forth in *Clemons v. Mississippi*, 494 U.S. 738 (1990), or the lesser standard of *Zant v. Stephens*, 462 U.S. 862 (1983)?

This Court has "never . . . explicitly answered the question [of] whether *Clemons* or *Zant* control when a death sentence is imposed under what is best described as a 'hybrid' scheme—one which consists of both 'weighing' and 'non-weighing' characteristics." *Flamer v. Delaware*, 68 F.3d 736, 769 (3d Cir. 1994) (Lewis, J., dissenting), *cert. denied*, 116 S. Ct. 807 (1996); *see also Davis v. Executive Dir. of Dep't of Corrections*, 100 F.3d 750, 767 (10th

Cir. 1996). To the extent that Missouri may be considered a "hybrid" state, petitioner respectfully requests that the Court grant the petition to settle the question of how the Eighth Amendment applies in such jurisdictions.

B. The Lack of a Standard of Review for "Hybrid" Jurisdictions Has Caused Confusion and Unconstitutionally Inconsistent Applications of the Death Penalty

Left without this Court's guidance, the jurisdictions that have "hybrid" sentencing schemes differ greatly about what standard of review applies, causing unconstitutionally arbitrary and inconsistent application of the death penalty.

At least three other jurisdictions employ capital sentencing schemes that contain both "weighing" and "non-weighing" elements: *Colorado*;[4] (ii) *Illinois*;[5] and (iii) *U.S. Armed Forces*.[6] These jurisdictions disagree as to whether the introduction of an improper aggravating factor is reviewed under *Clemons* or *Zant*.

Colorado's hybrid scheme, for example, which admittedly contains both weighing and non-weighing elements, is reviewed under the "weighing" standard set forth in *Clemons*. *See Davis*, 100 F.3d at 766. Similarly, the U.S. Armed Forces has applied *Clemons*

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4. *See* C.R.S.A. §§ 16-11-103(2)(a)(II) and (III); *Davis*, 100 F.3d at 766 (characterizing Colorado's scheme as "hybrid").

5. *See People v. Todd*, 607 N.E.2d 1189, 1197 (Ill. 1993) (applying the *Zant* "non-weighing" standard of review despite presence of statutory weighing factors).

6. *See Loving v. United States*, 41 M.J. 212, 248 (U.S. Armed Forces 1994) (noting that "Rule for Courts-Martial" ("RCM") 1004 is a "hybrid" scheme).

to its hybrid sentencing scheme. *See Loving*, 41 M.J. at 248. Illinois, however, which also has weighing and non-weighing elements, has applied the standard of review in *Zant*. *See Todd*, 607 N.E.3d at 1197. If Missouri can be considered a "hybrid" state, the ruling of the court below suggests that it disagrees with Colorado and the U.S. Armed Forces as to what standard of review applies.

These inconsistencies among jurisdictions can result in similarly situated defendants receiving the most widely disparate treatment possible: some have their sentences overturned while others are put to death. *See generally* Marcia A. Udder, Note, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 Tul. L. Rev. 1341 (1994). Capital punishment dispensed in this manner is inherently "arbitrary and capricious," and, therefore, violates the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). If Missouri is deemed a "hybrid" jurisdiction, this Court should grant the petition to resolve the sharp disputes among different jurisdictions as to how the Eighth Amendment applies under these circumstances.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

October 21, 1997

Respectfully submitted,
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